IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF WEST VIRGINIA, HUNTINGTON DIVISION

BEFORE THE HONORABLE ROBERT C. CHAMBERS, JUDGE

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JUSTIN ADKINS, et al.,

Plaintiffs,

vs. No. 3:18-CV-00321

CSX TRANSPORTATION, INC.,
et al.,

Defendants.
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REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARING

THURSDAY, AUGUST 5, 2021, 1:30 P.M.

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(Appearances continued next page...)

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HUNTINGTON, WEST VIRGINIA

THURSDAY, AUGUST 5, 2021, 1:28 P.M.

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THE COURT: Good afternoon.

MR. PAUL: Good afternoon, Your Honor.

MS. BIRD: Good afternoon.

MR. STEPHENS: Good afternoon, Your Honor.

THE COURT: Are we ready to proceed?

MS. BIRD: Yes, sir.

THE COURT: All right. So I wanted to hear argument on the remaining dispositive motions. I recall the defense has several. The plaintiff has one motion for partial summary judgment, part of which has been ruled upon but not all of which, so I wanted the chance for counsel to come in and argue.

It strikes me that, first, it makes sense to take up those claims that have as a matter of their elements the balance shifting test that is common to all of us. My recollection is that that would include the Family Medical Leave Act retaliation claim, and then the claims that the plaintiffs brought under ERISA, the state Human Rights Act and the Rehabilitation Act.

So I'd like your argument from both sides about those first, and then we'll shift to -- after that, I think we still have the Family Medical Leave Act interference claim and then

the Rail Safety Act claim.

And as far as I'm concerned, as long as you use a microphone, you can remain at counsel table, but you need to use the microphone so that my court reporter can hear everything. All right?

MS. BIRD: Is there any order by which you would like to hear those, Your Honor? Only because we're splitting the FMLA motion and the other three, ERISA, West Virginia Human Rights Act and Rehabilitation Act. Would you rather hear the FMLA first?

THE COURT: No, I think I'd actually rather hear the FMLA retaliation claim, ERISA, Rehab Act and Human Rights Act because I think all those have that common foundation of the balance shifting where, it seems to me, the principal argument is over whether there is evidence of pretext and whether the plaintiff has evidence to overcome that. So --

MS. BIRD: Agreed, Your Honor.

Go ahead and start.

MR. WALSH: Your Honor, Davis Walsh for the defendants. I'm going to address the FMLA retaliation --

THE COURT: All right.

MR. WALSH: I'll address both the FMLA, but I will address retaliation first and then concede the floor.

I think you've already hit on the key legal issue, which is pretext. You know, I think that the parties in terms

of retaliation --

THE COURT: Is your microphone on?

MR. WALSH: It is.

If it's easier, I could go to the --

THE COURT: Well -- or you might just speak up a little bit. The microphones are not great in here.

MR. WALSH: Let me make it a little bit easier.

THE COURT: All right.

MS. BIRD: And the court reporter's life easier because she's the most important person, right?

MR. WALSH: Is this better, Your Honor?

THE COURT: Yes, it is.

MR. WALSH: Okay. Great. It must be something with my microphone.

You've already hit on the key legal issue. We are at a point, I think, where the parties agree on the fundamentals, and we come down to pretext.

In the plaintiffs' brief, they cited three reasons to claim that there were pretext, and in the reply, our response was simply that those are non sequiturs.

The first one is that Dr. Heligman used the term subconscious or unconscious in his deposition describing the fraud. This is a situation of the plaintiffs picking out a word but ignoring what Dr. Heligman said in full.

What he explained, maybe not as a lawyer would have

explained those terms, is that what he was saying is that they didn't -- he's not claiming that they went into the examination room and said, hey, Doc, I want to get off of work, can you give me a note? But they went into the examination room -- they went to the chiropractors who are most known to be likely to give out-of-work information regardless of what the actual injury was, but to instead base that off of what the plaintiff told them the injury was.

So instead of -- in essence, if we wanted to give this sort of a criminal law analogy, and I'm not saying there's a crime being committed, but as an analogy, there is still fraudulent intent from what Dr. Heligman said. But the words weren't spoken, hey, I want you to do this thing that you're not supposed to do, actually out loud.

I also would point out that I'm not exactly sure how this is evidence of pretext. Because the pretext argument that the plaintiffs need to make, and frankly have not made, is that CSX's reason for dismissing or charging the plaintiffs that they were -- that they were involved in this submission of fraudulent COIIs is that -- that the actual reason was for them seeking Family Medical Leave Act leave. And there is simply nothing in the record where the plaintiffs have pointed to that that's the real reason that the plaintiffs were dismissed, was the attempting to seek leave.

You know, I think we cited to the Kariotis case out of

the Seventh Circuit, and I think in the preamble of that, the Seventh Circuit does a good job explaining that in that case, the plaintiff had claimed similar claims -- she claimed Title VII discrimination, I think age discrimination, and FMLA discrimination, for that matter. And the Seventh Circuit said, well, it's possible that she was discriminated in each of those ways, but that you need to show the reason she was fired was actually about taking the Family Medical Leave Act leave, and I don't believe the plaintiffs have shown that.

THE COURT: In that case, as I recall, the employer claimed that it was essentially the act of seeking the leave on an improper basis that was its reason for taking that adverse action.

MR. WALSH: Right, I believe -- yes, that is correct.

And then among -- and again, the FMLA is not a strict liability statute. I think at times the plaintiffs' brief attempts to say the fact that they were fired after seeking leave means that there was a retaliation or means that there was interference. The FMLA is not a strict liability statute as that case points out. The fact that she sought the leave improperly provided the basis on which she was eventually dismissed.

So looking back at the pretext, I frankly am lost at how Dr. Heligman's statement somehow or another shows that she was actually fired because she -- or, excuse me, not she --

that the plaintiffs were actually fired because they sought Family Medical Leave Act leave.

And the second reason that the plaintiffs cited in their brief is that Dr. Heligman's letters to the RRB predated the investigative hearings. Now, there are a number of factual reasons why the letters predated the investigative hearings, namely those letters are what kicked off the actual -- the further investigation into the particular issues. But fundamentally I come back to the same point, I don't see how that shows pretext, that somehow or another what really was happening is they were fired for seeking Family Medical Leave Act leave.

THE COURT: Well, I guess in fairness to plaintiffs -- of course, plaintiffs' counsel will speak on behalf of the plaintiffs. But my understanding is their argument is that when you look at Dr. Heligman's letter and then the speed within which CSX took action sending out these discharge notices and all that, and that it was all based upon sort of speculation and supposition, that Dr. Heligman's letter and all CSX knew at the time it was sending these firing notices was that, well, you've got these so-called suspicious circumstances of a number of people filing -- I forget the -- I know the acronym, I forget the name of the document that's the leave statement that the doctors have to sign.

That there was, I guess one way to characterize it, a

rush to judgment based upon inadequate considerations, and that that's what plaintiffs claim rings false about the reasons for the action, and that it -- that this action occurred so quickly after these notices were filed by the employees, that that's what supports the inference of a discriminatory intent.

MR. WALSH: And I think I would -- I have two points that we want to make on that.

One is, looking at the case law for inadequate investigation or rush to judgment, assuming that occurred, which we would dispute, do not overcome -- or are insufficient. If you look at the Seventh Circuit decision in Scruggs, or some of the other case law we cited in the brief, that the adequacy of the investigation doesn't undermine the belief that the defendant had or the employer had.

I think that the other important consideration here is that looking at the whole process factually, the letters were step one. Okay. The letters to the RRB were step one. Then there were charge letters. The plaintiffs were given the opportunity under the collective bargaining agreement to have a full hearing, which they had, to appeal that hearing and then ultimately go to the public law board.

Of the remaining plaintiffs, the public law board -- except one, the public law board upheld that CSX had proven fraud. And the one plaintiff who remains, the public law

board frankly found that he had committed the fraud or they -- CSX had proved that, but there was some mitigation. So they re -- put him back on service, just not with back pay.

So I think that while the plaintiffs want to focus on step one, looking at the entire factual picture and the entire record, there simply shows a consistency in CSX's belief of what happened, which was ultimately beared out not only through the collective bargaining agreement process, but also through the public law board upholding that.

So, again, this is simply not -- the consistency, I think, would weigh in favor of it not being pretextual. In fact, I think the consistency shows that what was suspected was beared out through the longer investigation and ultimately through the public law board.

The last thing that the plaintiffs cited in their brief in terms of pretext is claiming that Dr. Heligman had testified on one hand he was not interfering with the doctor-patient relationship, and on the other hand in his deposition he criticized the doctor -- the chiropractor's care. I go back to I'm not entirely sure why that shows pretext.

You're talking about a deposition where he says that he's not interfering with the doctor-patient relationship, and Your Honor has already ruled on that issue to some extent in the tortious interference claim. But simply saying in a

deposition that he didn't agree with the chiropractor's care -- Dr. Heligman is an occupational medicine doctor -- again, I don't think this shows any sort of pretext, that the real reason these plaintiffs were allegedly fired or the real reason they were fired is allegedly their seeking leave under the Family Medical Leave Act.

The Family Medical Leave Act retaliation and interference come from the same premise that you don't have any greater rights. That the employer could have fired you for the act. The Family Medical Leave Act doesn't provide you additional rights.

And here, the plaintiffs were fired, and then the parties agree that the reason was part of -- was based on CSX's belief, that was ultimately upheld by the public law board almost unanimously, for this fraudulent submission of COIIs.

THE COURT: All right.

MR. WALSH: Thank you.

THE COURT: Thank you.

MS. BIRD: Do you want to hear the FMLA response or do you want to hear the rest of it?

THE COURT: Well, I think the rest of it first.

MS. BIRD: Okay. Your Honor, let me address one point that you just raised with Mr. Day -- I just said I wouldn't do that, and I did it -- with Mr. Walsh, and that is the timing

of what happened.

The plaintiffs complain of the timing and the speed at which there was a letter charging the employees soon after the letter to the RRB, but you have to keep in context here that we're dealing with a collective bargaining agreement that sets specific time limits for which plaintiffs have to be charged pursuant to that collective bargaining agreement if there is a rules violation.

So in these cases, Dr. Heligman's letter is the triggering event that starts that timing for the collective bargaining agreement. And the first action under the collective bargaining agreement is a charge letter, which charges the employees with a possible rules violation and then starts the investigative process. So that charge letter is really the only way that CSX could investigate this situation that was suspicious.

They had 67 or more COIIs from the same two chiropractors in the same location taking them off work, and what were they supposed to do with that? Their only recourse really under the collective bargaining agreement, each one of these plaintiffs, was to charge them with a possible rules violation, which they did, and then that led to the investigation, which is the investigative hearing transcripts which we've all seen and are very familiar with, which then led to a termination letter, which was appealed internally and

then also appealed to the public law board.

So the speed at which this happened, first of all, was dictated by the collective bargaining agreement. Let's start with that. But secondly, that charge letter that may have been speedy, as they say, was the only real way to do this investigation. There was no right for CSX to go out and get information from these plaintiffs otherwise because their collective bargaining agreement started the process.

THE COURT: All right.

MS. BIRD: So I just want to address that part of what was said.

THE COURT: Sure.

MS. BIRD: And you're right, Your Honor, as we were coming in here today, we were talking about how these claims, these causes of action that you asked us to address first do have the same basis and the same arguments.

With regard to the ERISA claim, the prima facie case is that it starts with you had to have a prohibited action, which was there for the purpose of interfering or denying somebody their rights.

With regard to the West Virginia Human Rights Act, there has to be a protected class and some adverse action taken because of -- because the plaintiff was a member of that protected class.

In the Rehabilitation Act, you have to start with

somebody being disabled and then otherwise qualified for the job but then somehow discriminated against because of that disability.

In all three of those causes of action, it starts with something improper has to be shown before there is a prima facie case which shifts the burden of proof to even talk about pretext.

In this case, throughout all of the evidence, every single piece of evidence shows a consistent theme, and that theme is the COIIs came in. There was an excessive number of those COIIs. CSX, through the collective bargaining agreement, decided to investigate that. And then these plaintiffs were ultimately terminated because of the rules violation that was alleged in those COIIs.

There is zero evidence here that there was any reason or discussion, thought, plan or intention to deny people benefits, and that is what these charges and ultimate terminations came from. There is zero information, there is zero evidence that these people, these plaintiffs were charged because they were some protected class under the West Virginia Human Rights Act, or because they were disabled under the Rehabilitation Act.

Every single piece of evidence, including Dr. Heligman's testimony, including the testimony which we heard from their expert just yesterday, which we don't have the

transcript of yet, every single piece of evidence leads to CSX saw a suspicious activity and investigated it. It had nothing to do with the medical information within that. The only reason that came into play is because it was a medical document that was suspicious.

But what they did was they went out and investigated a situation because of their own belief that a rules violation and a policy consideration had been violated, and that was ethics and honesty. And every single piece of information leads back to this suspicion resulting in a charge letter so that those suspicions could be investigated.

Ultimately the plaintiffs were terminated and, of the remaining plaintiffs, only one was put back to work. And like Davis said, the public law board in that case said, oh, yeah, you committed fraud, but we're putting you back to work for another reason.

Every single other one of these were upheld because, in fact, they were terminated because they violated the ethics policy and the code of honesty.

THE COURT: All right. Thank you.

MS. BIRD: Thank you.

MR. PAUL: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. PAUL: Greg Paul on behalf of the plaintiffs.

THE COURT: Welcome back.

MR. PAUL: Thank you.

As an initial matter, just before I forget, we have settled six cases, and to the extent there is any rulings made today, you know, at some point maybe we can get those on the record.

THE COURT: Sure.

MR. PAUL: Second, if I could before getting into the FMLA and other the causes of action, Ms. Foster Bird brought up the collective bargaining agreement. And at some point, I imagine we will be briefing motions in limine, and one of the really important things is there is a long-standing Supreme Court precedent, Gardner versus Great West and others, the law of the land versus the law of the shop. So anything that happens under the collective bargaining agreement is by its very nature limited to that law of the shop, and that is separate and distinct from any federal employment law or right, whether that is the FMLA, ERISA, et cetera.

So, for instance, when the argument was made that the only recourse was to investigate this under the collective bargaining agreement, I don't think that is accurate. For instance, under the FMLA, this is the substantive provision. Had that COII, the certificate of ongoing illness, which we think we have strong evidence triggered notice of potential FMLA, that would have triggered a series of rights and responsibilities for the employer and the employee, such as

CSX sending out the medical certification form. That form would have to come back within, I think, 15 days. If CSX had questions about that, they can request clarification, and they can request a second opinion. There is even circumstances where they could get a third opinion.

So there are certain rights under the substantive provision of the FMLA that would have provided a lot of protection and the ability of CSX to investigate and also the employee to respond.

And I know that it sounds like I am arguing the FMLA substative provision, but I bring that up now only because it's both intertwined with the FMLA retaliation, and it is directly responsive to one example of how CSX was not limited by the collective bargaining agreement --

THE COURT: Okay.

MR. PAUL: -- substantively.

THE COURT: All right.

MR. PAUL: Turning to the FMLA retaliation provision, we agree in this case, none of the plaintiffs asked for FMLA specifically. We know that. Most of them, if not all of them didn't have any training under the FMLA, so it really just starts with that one-page certificate of ongoing illness.

And what Ms. Johnson, the FMLA director, and even Dr. Heligman had testified, there is a little box on that Medgate intake form that said, you know, could this be FMLA eligible,

and those were checked yes for the plaintiffs.

So at that initial gate, it didn't -- it was just known as medical leave, not FMLA, but that doesn't mean that they're not protected under the FMLA retaliation provisions. Because had they been approved, then CSX then would get into the burden-shifting and the pretext about whether there was actual evidence that they were engaged in fraud.

Which kind of goes back to one more basic point, if I can. There is very conflicting evidence from Dr. Heligman directly that sometimes, say the letter to the RRB, he carefully, or the legal department or labor relations carefully wrote that to say they were suspected of fraud. Other times in Dr. Heligman's deposition or in the hearing transcript, he clearly says -- and we quoted in our document at 397, document No. 397 -- that he had already concluded, that Dr. Heligman had already concluded that they had engaged in a scheme of fraud.

So those are kind of two different concepts.

THE COURT: Well, I agree. But I've read through --

MR. PAUL: Yes.

THE COURT: -- I suspect what is probably all or at least a vast portion of his deposition. And honestly I think it's a fair conclusion, which is the conclusion that I reach, that he was trying to be very careful not to literally accuse people of a crime, not to literally accuse them of fraud.

But clearly he believed, and he cited reasons for it, that this was sort of a collective action on behalf of the employees, whether it was done as a result of some express agreement which he couldn't prove, or whether it was just a tacit practice, that everybody who went to these two chiropractors at this time and got reports that were similar were really participating in a at least tacit agreement to try to file these COIIs and to get on some type of leave.

And so the fact that he admits that he's not accusing them of fraud, to me, really is kind of beside the point.

MR. PAUL: Well, I agree in the context of the letter to the RRB and the insurance company. His testimony in deposition and then back in 2017 was that he had concluded that they engaged in fraud without any evidence.

THE COURT: Right.

So, you know, honestly the principal reason that I wanted to hear this argument is I am at a point in my analysis where I really think that I've got to determine as it respects not only the FMLA retaliation, but the ERISA, Rehab, and Human Rights Act claims, that at least for the purposes of today I'm satisfied that you've stated a prima facie case.

CSX comes back with its proffered reasons for taking this adverse action, and I really wanted to hear your arguments about what evidence you have to demonstrate, to meet your burden that that is pretextual.

MR. PAUL: Sure. Yeah, and that starts with I think Dr. Heligman's testimony that we've quoted is inconsistent with itself.

Meaning maybe -- okay.

THE COURT: No, I understand what you're saying.

MR. PAUL: And I'm not saying that they had to call out the CSX police and do surveillance, but certainly there is a lot of cases out there where you have that. But I think all of us expected, at least on our side expected to see just a little bit more. I mean, just some evidence other than the coincidence of the number of COIIs, which, you know, they're all individual. And some people -- as we know, Devery Brown had been on disability for over a year, so he would have no incentive to defraud the company of anything. Others had treated with the chiropractors for years. So it's -- I mean, each individual is critical to evaluate whether there was a legitimate basis for that fraud.

So when they just say everybody was engaged in fraud, I mean, they've got to look a little bit deeper, I think, to articulate that non-discriminatory reason. Or if the Court felt otherwise, and it was our burden then to shift back and to explain why it was not a legitimate reason, we've gone through the fact that it was a predetermined process, the fact that, you know, the COIIs themselves provided legitimate medical conditions and the length of time.

One of their bases is to say that they were all basically two months, but the chiropractors would explain or others would explain that that is a legitimate time to treat those type of conditions.

So I think, you know, a jury should certainly be able to --

THE COURT: You've got responses to many of the arguments that CSX raised, but it also seems clear to me that the law is that an employer who offers a justification can be wrong, even about the justification, and that doesn't necessarily lead then to plaintiffs being able to meet their burden to show that there's an inference of discrimination as a result of a pretext.

So here, one of the things I am curious about is I understand why you were -- the people you represent were very skeptical of Dr. Heligman's first letter. But then what I'm looking at is, after that letter, a process that triggered that resulted in some level of hearings consistent with the collective bargaining agreement and ultimately, as I understand it, with the exception of maybe three or four cases where many people didn't appeal, but those who did except for three or four had the decisions against them affirmed.

So how is it that -- where is the evidence that this was a pretextual termination process?

MR. PAUL: Sure.

Well, we cited from Dr. Heligman's testimony. In those hearings that happened back in 2017, he had testified that they were already guilty before the investigation even happened. I mean, he testified at the opening of each of those investigations, I have concluded that they engaged in a scheme of fraud, so that is a predetermined investigation by nature. I mean, he had already reached the conclusion before he heard the testimony.

THE COURT: Was he the decision-maker at the -- throughout this process?

MR. PAUL: He -- well, that's tricky. He was certainly the only witness on behalf of the company, you know, to testify. I think he was definitely the decision-maker with respect to certain things like initiating the charge.

THE COURT: Okay.

MR. PAUL: But when it comes to the ultimate decision-maker, I think that was referred through labor relations to a management head, who relied exclusively upon Dr. Heligman's testimony. So --

THE COURT: Well, so I will come back to where I started a moment ago.

The fact is an employer can be wrong -- and I'm not saying they even were wrong here because it got upheld through the process --

MR. PAUL: Sure.

THE COURT: -- and many people didn't even appeal.

But where it's clear even an employer can be wrong, that doesn't in and of itself prove their basis was pretextual.

MR. PAUL: No, not if they were wrong. And I am not sure if Your Honor is getting to that honest belief doctrine, if this is the time to address it or not, because --

THE COURT: Well, perhaps. I mean, until I started reading the briefing on this case, I hadn't seen that terminology used, and I don't know that in my mind it's anything other than a label for that which we commonly apply already anyway, which is determining whether an employer had a good faith basis for the action that they took.

MR. PAUL: Right.

THE COURT: And so here, honestly it's hard for me to find that there wasn't a good faith basis for their action when they initiated a process that is performed under the collective bargaining agreement that resulted in largely the approval of the discharges that they filed.

MR. PAUL: So, I mean, that's where I started out with the limitations of the collective bargaining agreement. I mean, the only scope that the investigation in the collective bargaining agreement has is of the collective bargaining agreement itself, which for railroaders does not include any federal employment law. It is possible that some other

collective bargaining agreements do, but they are limited in their very nature by -- so when we talk about the public --

THE COURT: How does that change the result here?

MR. PAUL: Sure.

THE COURT: I agree they're limited, but here it was, I understand, expressly the purpose of this review to determine whether or not the termination decision based upon Dr. Heligman's suspicions was sufficient under the collective bargain agreement. They said it was.

MR. PAUL: Well, limited to -- sure, those rule violations, but limited to that conduct, not limited to any violation of any federal employment law. So that just wasn't considered.

THE COURT: Well, but -- okay. I'm not sure that I think that matters or that I understand perhaps your point. Because what we're talking about is whether or not the employer essentially had a good faith basis for taking the action. They can be wrong, they can be quick to judge -- there are plenty of cases that talk about that sort of thing -- that sort of criticism does not rise to the level of being evidence of pretext.

It seems to me there's got to be something more, and I don't know where the more is here.

MR. PAUL: Okay. And maybe it would be important to draw a distinction between their good faith effort to

initially charge versus their supposed good faith effort to terminate, if I can talk about that for a minute.

THE COURT: Sure.

MR. PAUL: I mean, because certainly getting an influx of COIIs would give rise to, sure, let's look into it. But then when you actually -- and if your reason, one of the reasons was to get out of the coming layoff announcement, and about half the people weren't even subject to the layoff, that is a critical fact that would have come up during a reasonable investigation.

As to how --

THE COURT: Well, it seems to me that -- and I admit perhaps I haven't spent as much time as I'd like thinking it through, but it seems to me that cuts both ways.

On the one hand, yes, you could say, you know, they took this action quickly in order to reduce, essentially reduce the effect of the furlough. But it seems to me that we could also say the reverse, that in this case they had little incentive to take this action against people who weren't even on the furlough list.

MR. PAUL: Right. And I guess --

THE COURT: Because you weren't going to be furloughed, so you don't -- so CSX had no motive to dump them off of the furlough list.

MR. PAUL: Right. So why would that support -- I

mean, I'm not asking a question. I understand --

THE COURT: I guess that's what I get to.

So I don't see how -- it seems me it's almost an inference that one could argue could cut in favor of either side here, and that's why I have trouble sort of figuring out if it really deserves to be a material --

MR. PAUL: Yeah.

THE COURT: -- element of my consideration.

MR. PAUL: Well, our argument would be and our, you know, statement on that would be that someone who is not subject to the layoff at all should not be scooped up with all of these other suspicions through the investigation.

THE COURT: Well, you may be right, but the inference that I'm trying to say is that maybe that supports the inference that it was really their reaction to all of these COIIs coming -- and their similarities that was the motivating force here and not trying to play fast and loose with furloughs or that sort of thing.

MR. PAUL: So I'm not agreeing with this, but that may be true in June of 2017, but that certainly wasn't true in August of 2017 when they made the decision to terminate.

So, you know, I think Dr. Heligman testified at first he wasn't sure if people were laid off or not, he just saw a pattern that throughout the course of those three months or slightly under three months, you know, evidence certainly did

come out and people testified I wasn't subject to lay off or furlough. Or they said I don't treat with just this chiropractor, I've been treating with an orthopedist, I mean, other things that would substantiate this wasn't, as I think their suspicion was in June, that they were first going to these chiropractors just to get paperwork completed.

And just for instance, I mean to cite our brief again, it's document No. 397, page 5 and 6 of 27, Dr. Heligman testified that he had no reason to believe that the illnesses were not legitimate, that the COIIs did not appear fraudulent, because that's at direct odds with the suspicion in June that he would have felt.

And then later he testifies that they went to the chiros, quote, with the sole intent of obtaining medical documentation for the purpose of seeking benefits improperly, that is the fraud, end quote.

So those are two different worlds to look at this COI and say there's nothing suspicious about it, which he testified to versus the letter to the RRB that suggests otherwise, and then later to say that that was a fraud. It's that type of inconsistent testimony that could support an inference for a jury to conclude that it was pretextual.

Now, you know, we think there is more going on than just this one day when these COIIs came into the medical department. I mean, we think that there was a plot by CSX to

try to eliminate the work force. And that could be done legitimately I suppose, but the way they went about doing it here by accusing people of fraud was not.

I don't know if you have any other questions.

THE COURT: Well, I think -- I'm not sure, both sides may have cited the Mercer case. That was the Fourth Circuit case I know the defense cited because it cited approval of that Seventh Circuit case that they've argued about. But the language was there, and then there was another per curiam later on in the circuit which also seemed to approve of the Seventh Circuit case, but then used this kind of language:

The district court must evaluate whether plaintiff has demonstrated such weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find worthy of credence.

And while I appreciate that in his deposition Dr. Heligman made the statements you're referred to -- I don't question it's in there, I just haven't read through it -- is that what this boils down to then on the plaintiffs' side? Is really your evidence of pretext actually just Heligman's inconsistencies in his testimony?

MR. PAUL: So it's not only, but it's primarily because he was the only witness.

So this is not an example where an employer did an investigation and had five witnesses, and they said different things so you have to weigh things. You could argue that that could be inconsistent but not evidence of pretext. When it's the sole witness, Dr. Heligman, the only witness that they ever had and his testimony is inconsistent over time, that's what would support the pretext analysis.

THE COURT: Well, and maybe you can refresh my recollection about this.

So did Dr. Heligman make in his testimony during the investigatory hearings the same type of statements that you pointed to here that were inconsistent or contradictory?

MR. PAUL: Yes.

THE COURT: So --

MR. PAUL: Yes. And we've summarized those at document 397 starting at page 3 through 8.

THE COURT: I remember some of that being laid out. I just frankly didn't remember --

MR. PAUL: Yeah.

THE COURT: -- what the source was, whether it was the hearings or whether it was his deposition in this case.

MR. PAUL: It was both because -- well, I mean, I guess you could say it was the deposition because in the deposition we asked him about the hearing. But there is the -- I don't know if that makes sense.

THE COURT: It might, but that still leaves me a bit confused. Because if in his testimony at the hearings he described really what he summarized in the letter that started all this, and in that summarization he alluded to the fact that there were all of these unusually high number of COIIs in a short period of time, that these were also temporally related to sort of the swirling news around the workplace about the new people at the top and the possibility of major changes, furloughs, layoffs, et cetera, that he found that this sudden influx that, as he reported in his letter, were reports that were very similar, strikingly similar in the way it described the employees' complaints, their symptoms, the conclusions that they should be off work for this precise period, and the fact that these were all coming from two medical providers -- and I attach no negative sort of inference to the fact that these were chiropractors at all.

But it would -- those were the things that he said in the letter, and that's what I assume was principally his testimony at the hearings, and so even if he contradicts that later in his deposition testimony or undercuts it by saying, well, I didn't really mean fraud, oh, I'm not saying that they didn't really have problems or medical conditions, I mean, even if he backtracks that in the deposition, I'm not sure how that goes to proving that CSX was essentially guilty of using a pretextual basis for the discharge.

MR. PAUL: Well, there are certainly -- in his depositions, litigation depositions, there were certainly a number of inconsistencies that came up. But, I mean, I think we've hit this point that in contrast to the letter to the RRB where it was a suspicion, he definitely testified at those hearings, you know, along the lines that, in his deposition, he read the response from the investigation hearing. I found these employees' actions to be concerted fraud, effort to defraud CSXT and the Railroad Retirement Board and insurance providers for the extended benefits.

And the key is that nothing happened between his letter to the RRB and those hearings in terms of what Dr. Heligman did as an investigation that would change that. That's why it's so predetermined. And the reason it was predetermined is a whole host of reasons that fit into kind of a mix, whether it's the ERISA benefits because they don't have to pay the health insurance if they're not on extended sick or if they're -- have a disability or the use of the FMLA, that they have to hold those jobs. Because we know or we believe that there was a real effort to eliminate positions, and that wouldn't have happened had they given the FMLA protections and ways to provide other information for the employees to support their medical conditions, rather than just have it rest exclusively with Dr. Heligman just based on his suspicion.

THE COURT: Okay. Thank you.

MR. PAUL: Thank you.

THE COURT: All right. Brief reply?

MR. WALSH: In terms of reply on retaliation, there's just a couple little factual points I want to hit on.

One, Dr. Heligman is not the only person, not the only actor in this case. He was the person who identified the issue, brought it forward. The terminating officer for most all these cases is a gentleman named Brian Barr -- the terminating officer or decision-maker was a gentleman named Brian Barr, who looked at the hearing transcript, the facts established and made his decision.

Dr. Heligman is right now, I think, a boogeyman for the plaintiffs, but that's not how the process played out.

THE COURT: Was he the only witness at the hearings?

MR. WALSH: I don't believe that is accurate.

The charging officer was also a witness, so they would have somebody in the craft who would charge the employee who would testify, and Dr. Heligman would also testify.

THE COURT: Well, but to your knowledge, was all the evidence that formed the basis for the decision by the board Dr. Heligman's complaints or his criticisms of the COIIs?

MR. WALSH: I think that is generally accurate, but that goes to his analysis. I think it's inaccurate to say that all -- that nothing happened between the time of the RRB letter and the hearings. You know, as Ms. Bird pointed out,

it started the investigative process. There was more that was done. It didn't change anybody's mind.

Ultimately, Your Honor, the question I think you've asked is what is the evidence of pretext, and they simply -- that there was some sort of motive out there. And at this point plaintiffs' counsel has only put forward a supposition, frankly a baseless supposition, that there was some plot to eliminate the work force. There is simply no evidence of that at this point.

Pointing out what are perceived inconsistencies from Dr. Heligman saying they did commit fraud to they might have committed fraud simply isn't evidence of pretext, I would submit. And frankly I also disagree that he was inconsistent. But in terms of retaliation, those are the points I have to make.

If you have any questions --

THE COURT: All right. Thank you.

MR. WALSH: Do you want to talk about -- I'm sorry.

MS. BIRD: Let me just add -- that's okay. Go ahead.

Let me just add one thing to what was said, that Dr. Heligman and the charging officer were the witnesses on behalf of CSX. On behalf of the plaintiffs, they testified themselves. They also had the opportunity and were offered the opportunity at every hearing to present any other witnesses they wanted to present, including the chiropractors,

which did not come, including any medical treaters, which would have alleviated or supported their claim that they were properly off work for a medical condition. So there were -- there was other evidence at the hearings. It wasn't just Dr. Heligman saying his point.

And the person who is missing here is the person who made the decision to charge the plaintiffs and made the decision to terminate the plaintiffs. He testified in this case for half a day. His name is Brian Barr. At one point, he was superintendent of this area, in Huntington and the division here. He's now at CSX. He's about the third person in charge of CSX. He was involved in this process from day one when this information was brought to him to make a decision whether or not to charge these plaintiffs and investigate the situation, which was the way to do this under the collective bargaining agreement.

So when he made -- when those charge letters went out, evidence was heard at the hearing. The plaintiffs all had the opportunity to bring any other evidence they wanted to bring, which would have been carried through through their appeal and through the arbitration to the public law board, and they did what they needed to do. Some of them submitted medical records. Some of them submitted other things. None of them brought any other witnesses, which they were allowed to do, and all of them testified as to the situation on behalf of

themselves.

THE COURT: All right. Thank you.

MR. PAUL: May I just briefly?

THE COURT: Yes.

MR. PAUL: I think bringing up Mr. Barr, who was the top management person --

THE COURT: Right.

MR. PAUL: -- his deposition I think was taken after, so we don't have the benefit of that in the briefing.

If the Court would want some supplemental briefing --

THE COURT: Well, they brought it up. I hadn't seen it referred to at all in the briefing before.

Is there something you want to say responsive to what --

MR. PAUL: Well, what's probably the biggest, most important thing that came out of his testimony and other managers is that typically almost always after a hearing, the hearing officer would make a recommendation, and that didn't happen in these cases, and there's really no explanation for that other than that it was also predetermined. But it's kind of an important fact because it shows an irregularity in the way that things were normally done in that collective bargaining agreement process.

And not to re-urge what I said earlier about the FMLA, but when counsel says that the plaintiffs could have brought

in -- maybe she didn't say their doctor, but medical evidence or something to support their claim, that's exactly what the substantive process of the FMLA would have provided. So it's, I think, a separate process, but an important one, that would have shown light on why they were treated.

THE COURT: All right. Thank you.

MR. PAUL: Thank you.

THE COURT: All right. Let's go with the interference claim, then.

MR. WALSH: Your Honor, on the interference claim, I think again we're down to just a couple issues, and you've already addressed some of them with Mr. Paul.

One of the key issues is does the good faith belief doctrine, or however we want to refer to it, apply. I think the case law, as you've pointed out, is clear that it does apply. The plaintiffs' main argument I would say against that is to claim that it doesn't apply, that the Fourth Circuit hasn't adopted that.

I don't think -- I'm sorry.

THE COURT: No, go ahead.

MR. WALSH: I frankly just disagree. You've already talked about the cases, I don't need to spend time talking about them, where the Fourth Circuit has cited approvingly to the Seventh Circuit and other circuits' determinations on that.

So the question simply is did -- I'm sorry.

THE COURT: Well, one of the questions I wanted to raise, and I didn't want to interrupt you, but you caught me thinking about it.

MR. WALSH: That's --

THE COURT: And that is, I'm trying to determine what if any practical effect there was by the way this was handled in terms of the Family Medical Leave Act.

So people who filed COIIs didn't go to work.

MR. WALSH: Yes, Your Honor.

THE COURT: They were off work.

MR. WALSH: Yes.

THE COURT: And I assume then that -- so what was their legal status with CSX during the period when they submitted their COIIs and stopped working under those notices up to the point of when they got a discharge notice?

MR. WALSH: I'm going to have to defer to Ms. Bird. I believe they were just considered off work at that point.

MS. BIRD: That's right, Your Honor, they were considered off work.

THE COURT: Well, they were off work, but what does that mean in terms of entitlement to any benefits or --

MS. BIRD: Everything continued.

THE COURT: Meaning all their health insurance --

MS. BIRD: Except that -- yes, everything continued,

Your Honor. Some of them submitted for Railroad Retirement Board medical leave, which they would get medical pay. Some of them submitted and got insurance benefits for being out of service. But they were still employees of CSX; their jobs were protected and held until this process played out. They were receiving RRB benefits in terms of pay because they were off work sick, right, but their jobs were protected and just going through the process of discipline.

THE COURT: Okay. Thank you for clearing that up.

MR. WALSH: And legally, Your Honor, that's the key second point we wanted to make. There simply is no prejudice here. Even if you assume for a second there was interference, and I think that most every piece of evidence that plaintiffs cited goes to the question of whether there was adequate notice for FMLA purposes, that's not something we moved on in the summary judgment, you know, motion.

So at the end of the day, the second main point here is there is simply no prejudice because whether they were specifically deemed FMLA off or they were off work sick or they were whatever it may be. They were still able to take that leave, or they still took that leave. They weren't required to come to work, they --

THE COURT: But they weren't told they were on family medical leave act.

MS. BIRD: No, they were not told they were on Family

Medical Leave Act, but I think -- and I am forgetting the cases, but I know we've cited them in our reply, that this is a function of a reform statute in that a technical misclassification does not result in any damages or prejudice to the plaintiff in terms of an interference claim.

THE COURT: Well, okay. So I understand that would perhaps cover all of the employees and show there's no injury up until the point of the discharge. The discharge notice certainly went out within the 12-week period that is guaranteed for family medical leave. So wouldn't then the possibility of interference start to arise again?

MR. WALSH: It is theoretically possible, but that's not what happened here. Because for the employees who were discharged and ultimately upheld by the public law board, the Family Medical Leave Act, as I said before, doesn't provide any greater rights than they would have otherwise. They were fired for their breach of the CSX rules, ultimately dismissed for their breach of the CSX rules.

For those handful of employees who were reinstated by the public law board, their positions were protected. They went back to where they were, and that is what required under the Family Medical Leave Act. Again, whether it was done with a particular paperwork under the Family Medical Leave Act and whatever else is immaterial given the effect was ultimately the same.

THE COURT: All right. Thank you.

All right. Mr. Paul?

MR. PAUL: Thank you.

Initially I couldn't find the Fourth Circuit case on it, but the concept of retaliatory discharge under both sections of the FMLA is recognized by the Sixth circuit in Seeger versus Cincinnati Bell, 681 F.3d 274, Sixth Circuit 2012.

So what I'm hearing is that an argument under interference, it falls something short of termination. And that can be the case under certain facts, but that's not what happened here. They're so related.

But, in other words, you know, we've already talked about how none of the plaintiffs were informed of their rights or responsibilities under the FMLA, which would have certainly triggered a bunch of deadlines for them and their doctors to respond to get that FMLA certified. CSX and Jolanda Johnson, Ms. Johnson and others testified that they knew about the possibility of that leave, and Ms. Johnson testified the reason she didn't trigger any FMLA substantive protections was because they were suspected of fraud, which kind of is another predetermined way.

I mean, certainly you could send someone the paperwork. It's really -- I even think they used a third party administrator, Kepro, to send the paperwork, and then

you can do your investigation. And if you ultimately concluded there was some improper motive, then you could, you know, invalidate that leave. But it's very clear, and that's why we moved for summary judgment on this claim, that none of that happened.

THE COURT: Well, although it's characterized in the briefing as this honest belief rule, doesn't this claim also perhaps come down to the same analysis, that being whether or not CSX essentially had a good faith belief that it had the right to take this discharge action in view of its perception that these employees tried to pull a fast one?

MR. PAUL: Yeah, so I'm not sure it's even in dispute, but the briefing is out there that intent is not a requirement for an interference claim.

So if that is true, and I --

THE COURT: But it's not interference if they have a legitimate reason for taking the adverse action that's not based upon a discriminatory reason.

MR. PAUL: I think --

THE COURT: It seems to me -- I agree with you, I think it still gets us to exactly the same place in terms of the evidence, and that's whether there is evidence that CSX took this action essentially pretextually to try to defeat one or more of the rights that the employees had under these various federal and state acts.

MR. PAUL: I think another way of saying it, if I can try a different way, is because there's no intent requirement in the interference claim, any belief, honest or otherwise, is not relevant. But I think what Your Honor is suggesting -- if that's true, then honest belief doesn't matter at all.

But I think what Your Honor is thinking is that if it later comes -- information comes up that kind of casts doubt on the legitimacy of that -- and I'm not making that up, that's part of the FMLA regulations. If any reason comes up to cast doubt upon the validity of the certification, then an employer has, you know, an opportunity to request recertification or do all kinds of things. That's the process that should have been played out for an interference claim. That's how it's very, very different.

Because otherwise how can courts almost everywhere, to my knowledge everywhere say intent is not a factor in an interference claim if an employer could pull the honest belief and say that's what we believe.

Which leads to another question, which is if -- I believe the -- well, not I believe. I believe one of the first cases that came out on honest belief was an employer fired someone because they thought the person was stealing from the cash register, and the person was black, and they were fired. And later the employer found out that that person wasn't even there, so it couldn't have been him. So they

said, well, that's not race discrimination, that was just an honest belief.

But there has to be some evidence that they made a mistake, right? I mean, CSX has not done that at all. Otherwise any employer anywhere could say I honestly believed X, Y and Z, and they would get off the hook in any case. So there has to be some acknowledgement that what they believed was wrong.

THE COURT: Well, I don't know that -- I may be misconstruing some of these cases, but I've always considered this, that the employer has to have an objective basis for its decision. Meaning it can be wrong, but there has to be at the time the decision is made an objective good faith belief in what it's doing.

And the Mercer case talked about this somewhat. They kind of rejected the plaintiff's explanation of her sort of defense as to why she was really a good employee and how they had to be wrong about that. And the court I think is very clear in saying, well, it's not up to us to decide whether the employee was a good employee or a bad employee. All we can do and all we are authorized to do here is look at whether or not the employer met its responsibility.

And they said there, and cited the Seventh Circuit case we've talked about, they said there, showing that there might be inconsistencies in the way that the employer

justifies their decision, you know, there -- I assume you agree here there is not direct evidence of discriminatory intent under any of these statutory schemes, right?

MR. PAUL: That's correct.

THE COURT: So it's all based on whether or not an inference is to be supported from the other evidence. And so it seems to me that in the Mercer case and in the Seventh Circuit case and others, it's not literally just an employer saying, well, I believe this, I'm off the hook. The court looks at the evidence about it and whether there is a good faith basis for it.

And so I come back to where I kind of started, and I probably got more confused than helped, but it does seem to me that ultimately the interference claim rests really under the same analysis that the retaliation claims rest on. And that is, is there evidence here sufficient to have a jury decide that this may have been pretextual on the part of CSX?

MR. PAUL: The only problem, Your Honor, is that with the interference claim, we look at the actual elements. Not one of those elements asks about intent or about honest belief.

THE COURT: No, but it is not interference to take an adverse action against an employee who is on Family Medical Leave Act. It doesn't create an inference because the employer may have lots of reasons and basis to do that. And

in the Seventh Circuit case, it literally was this person went on Family Medical Leave Act; while that person is on leave, we determined that her basis for that leave -- and I forgot what the facts were there, but they explained it in the Mercer case. But the basis upon which she sought her leave act leave was false, and so there the court affirmed that the employer still has the right to take action.

So here, plaintiff is -- defendant is claiming that even if you were entitled to leave act for all of this time, while you were exercising that time, while you were on leave, we determined that you gave fraudulent or false reasons, a false medical statement essentially, and so we have the right to take that action, and that does not constitute interference with the leave act.

MR. PAUL: I would just -- you know, we referenced that section about the cast doubt on the validity of the certification. I think that's where that falls in the, in the substantive provision.

And I know the cases, they often -- counsel and courts can get those two confused because I think they do sometimes overlap. But I do think in the substantive provision, there is just no place for that analysis.

And the regulations specify that if -- that happens often in the social media context, right? Somebody is on leave, approved FMLA leave, and a co-worker says, hey, look,

they're skiing or whatever, and that comes back, that is reason to cast doubt upon the validity that triggers a certain process.

Or an employer could not do that --

THE COURT: I completely agree with that.

MR. PAUL: Yeah.

THE COURT: And here what we're faced with is the employer deciding not simply that somebody is or isn't injured or disabled, but rather that essentially they lied, they've committed a fraud by participating in the COIIs under these circumstances.

So it's the violation of that truth -- and that's literally what they say, and there's no hiding that. CSX says in charging letters, we think you provided false information. And under the collective bargaining agreement, we can fire people for providing false information.

So that's different from saying, well, we're not sure that you are still disabled or that really your doctor's determination that you can't work for two months is a fair medical determination, so -- they didn't treat this as something under the Family Medical Leave Act clearly, but instead they treated it as an employee providing false information.

MR. PAUL: Under the collective bargaining agreement, and I guess that's the really important point I want to make.

Had CSX said we received information that cast doubt on the validity, it wouldn't just end there. Then it goes back to the employer and his and her health care provider to explain why that leave was consistent with the medical reasons. That never happened in this case. And if it did, that would have given the employees a huge opportunity under the FMLA to explain the situation rather than just focused solely on the collective bargaining process.

THE COURT: Okay.

MR. PAUL: Okay. Thank you.

MR. WALSH: Your Honor, just two final points on that part, and then I can address the plaintiffs' motion if you'd like.

The first is we've heard a lot about predetermined, but predetermined is not pretextual, and I think that's important in the analysis. Because even assuming the plaintiffs were right, which we would not give, a predetermined outcome is not evidence that these plaintiffs were fired for seeking Family Medical Leave Act, ERISA benefits, whatever it may be at that point. So I think there's an important distinction to make there.

And frankly the case law simply does not say that CSX must admit it was wrong under the honest belief doctrine. I think the cases that you and I have talked about, each time the employer still believed, as CSX does, that it was right.

Mr. Paul has made a point about the process under the Family Medical Leave Act, and that if it had been processed as family medical leave, other things would have occurred. Again, I think the dispositive question is here the honest belief doctrine, but I would point out that under the FMLA, the rights under FMLA are no greater to available to the employee than would have otherwise been available. So this is a place where the CBA sets forth rights that are available to the plaintiff that were followed, that went through and ultimately led to dismissal. The FMLA, as stated in the regulations, did not provide any greater protections or rights to the employee, you know, when those things are followed.

On the plaintiffs' motion that was discussed briefly, I'm happy to answer any questions, but I do want to point out that in the reply the plaintiffs have effectively conceded their motion. In the original motion, the plaintiffs moved on FMLA in toto, both interference and retaliation. In the reply, the plaintiffs have now stated they are only moving on two elements of retaliation and two elements of interference. That is frankly not what they moved on. Rule 56 would require them to state what they moved on in the original motion.

And we can talk about -- Judge Faber has an opinion that hits on the proper use of summary judgment. There is other ones out there. This is not a circumstance where the plaintiffs were moving on liability, but not damages. They're

now moving on just two elements after seeing the fact that they frankly can't meet the other elements.

So I'm happy to address any questions you may have.

THE COURT: All right. Thank you.

All right. One more to go, that is the Rail Safety Act.

MS. BIRD: That's right, Your Honor.

Your Honor, this is a very specific statute, very specific because it is there to promote the safety at the railroad and also to reduce accidents and injuries at the railroad.

And part of the basic factor that goes through all of the argument I'm going to make, it is necessary, if the plaintiffs are complaining about an injury and that they were terminated because of an injury, that they have to also prove that that injury occurred at work. The case law supports that, the statute supports that, and it is a necessary element under both the Third Circuit case and the Sixth Circuit case that we filed in our briefing that they must have been injured while they were at work.

And in this case, there is absolutely no evidence whatsoever that any of these plaintiffs were injured while they were at work, and I'll point to a couple of things.

And I can go through the statutory scheme, but I know the Court has read the briefs and understands the briefs that

we have in front of us.

On 20109(a)(4), that is one cause of action, that is the one for retaliation for reporting a work-related injury. That was a claim that plaintiffs made in the complaint. We moved for summary judgment on that issue. Plaintiffs dropped that claim in their response. In their response, they did not address 20109(a), which is retaliation for reporting of work-related injury or illness. I think the reason is clear, they didn't do that because there was no work-related injury or illness to report.

As to 20109(b)(1)A, 20109(b)(1)A, that is the claim that plaintiffs were fired for reporting a hazardous condition at work. Let's start with the fact that they did not exhaust their administrative remedy on that issue. Under the scheme with the FRSA, they have to go through the Department of Labor through OSHA in order -- as a first step for making those claims. In those claims to the OSHA, they did not at all mention any of this hazardous activity reporting argument that they now try to make. So they have not exhausted their administrative remedy on that issue and have in fact then waived making that claim in this court.

The third argument they tried to make under the FRSA, 20109(c), is that they claim that they can -- that the defendants interfered with their ability to follow a treatment plan walking -- with their treating provider, or physician is

what the statute says, and we can argue about whether or not the chiropractor falls under that. Under the plain language of 209 -- 20109(c), a chiropractor does not fall under that, and there is a case specifically on point that we cited in our motion that held that chiropractors are not treating physicians, that the language of the scheme requires that, and they do not meet that. So that is one reason.

More importantly, as to 20109(c) it requires that there be a workplace injury in order for that treating physician plan to come into play. That did not happen here. Although there are some broad-based arguments about they were weakened by their work on the railroad, there is simply no evidence to support that.

The chiropractor, when asked that specific question, Dr. Johnson testified -- I asked him or Megan asked him, once you noticed influx, did you reach out to CSX to determine if there was anything happening to cause an influx? He said, Well, no. It had nothing to do with CSX. It had to do their being hurt at home. Not one person that I'm aware of came in during that time that were CSX employees that claimed that it was a work accident.

There is simply no information in this case from him or from anyone else that this happened off the job or they were somehow weakened which caused their out-of-work injury which they reported on the COIIs.

They said they would rely on Dr. Freeman, their expert retained witness for this evidence. Dr. Freeman was deposed yesterday. Unfortunately we don't have the benefit of Dr. Freeman's transcript. Dr. Freeman said, No, I don't know. I don't know how they were hurt, that's not what I'm looking at.

Every one of the COIIs said they were injured off of job. Their complaints to OSHA said they were injured off the job. OSHA complaints were denied because they were injured off the job. And there is no evidence that is presented in this case to show that they were injured in any other way that would allow 20109(c) to apply.

I can walk through the statutory scheme if the judge would like, or you can ask questions, however you'd like to handle it, but that is the crux of this entire motion. There is no work-related injury to allow for a claim that FRSA was violated.

THE COURT: All right. Thank you.

MR. PAUL: Your Honor, it is correct, the (a)(4) claim is gone, so we do not respond to that because, you know --

THE COURT: Okay.

MR. PAUL: The (b)(1)A has to do with two things actually, I think a little bit more than counsel had argued. It's a hazardous safety condition but also -- and B is also the refusal to work because of that hazardous condition. And there are some new cases, two out of the ARB, Ingrodi and

Cieslicki, which is actually in the Fourth Circuit, but not a Fourth Circuit -- just within the Fourth Circuit at the Department of Labor, and then the Kurec versus CSX case, those are all in the last couple of years, that have clearly said that those hazardous conditions do not have to be work related.

And so the examples in those cases were one gentleman who was not on call -- I think that's an important fact -- he was called a derailment. He had had two glasses of wine with dinner, and he said, I don't feel safe to work, you know, and he was terminated. And they found in his favor because clearly drinking wine would not be a work-related event, but nonetheless it impacted the safety that would happen at work.

And there was -- the other example, the gentleman in Grady was vomiting and had diarrhea, and so he had reported back that he didn't feel he was safe to work because of those conditions and was terminated, and that was also overturned.

THE COURT: Weren't those cases where the employee was being required by the railroad to come in to work?

MR. PAUL: Yes.

THE COURT: And did that happen here?

MR. PAUL: Well, normally -- I want to answer this way, I am not evading it. I mean, to answer your question, no, at the time they completed the COIIs, the certificates of ongoing illness, they were not being required to work, but

that's why they did the certificate of ongoing illness.

In other words, if they didn't do a certificate of ongoing illness, they would be terminated -- excuse me -- terminated for not showing up.

THE COURT: Well, okay.

MR. PAUL: It --

THE COURT: So they indicated to CSX they had this illness, they filed the COII, their conditions prevented them from working, and CSX did not try to make any of them come in.

MR. PAUL: Well, no, that's correct, but it was because they needed the treatment, whether it was a couple hours to sober up -- two glasses of wine, but whatever -- to get back to where you could work safely or, for these gentlemen, a couple of weeks or two months to get back to where they could work safely.

THE COURT: What did CSX do in response to the COIIs that constituted or resulted in some hazardous condition? I mean, it seems to me in those cases those are striking examples of the difference.

Because those cases involve CSX tried to make somebody come to work who shouldn't be at work, and had they gone to work, they might have been a danger to themselves or others. And here we've got people who said, we've got injuries or conditions that keep us from being able to work, and CSX allowed that, they didn't call them in to work.

Now we know they took punitive action --

MR. PAUL: Of course.

THE COURT: -- and stated that that action was because of other reasons, this supposed lie about these forms, but what I don't see is where -- I don't see how you could argue that there is a failure of CSX or an intent by CSX to discriminate against somebody for reporting a hazardous condition that never existed because people were never called in to work.

MR. PAUL: Well, there are a different set of facts between those cases, they are.

THE COURT: Right.

MR. PAUL: But, I mean, in our situation here, CSX did not honor that report of an unsafe condition. And it is complicated when you are reporting yourself as an unsafe condition, but they didn't recognize that. They immediately questioned it for the reasons we've already talked about.

THE COURT: Well, they questioned it, though, in a completely different context and not a context, it seems to me, that implicates the Rail Safety Act.

As you can probably tell from my responses to your argument, I think you're really stretching this act beyond reasonable application by making these claims here. These people all said we've got medical conditions that keep us from working. Those medical conditions you now agree are not

work-related conditions that would result in the implication of an (a)(1) or (a)(4) argument, but you argue that they fall within this hazardous conditions or even the other provision about interfering with somebody's treatment.

So --

MR. PAUL: Yeah, if I could address that.

THE COURT: Well, okay. But first, just in terms of the hazardous work condition, I don't see that a hazardous work condition was created or suggested since CSX didn't try to make these people come to work despite their health.

MR. PAUL: I think the only -- or not the only way, but one way of looking at it is if the employees had not submitted the certificate of ongoing illnesses and reported to work, and then they would have avoided this entire suspicion, they would have put themselves and others at risk for the injuries that they had --

THE COURT: Well, obviously I think if CSX had called people the next day and said, hey, despite your COII, come to work tomorrow, then maybe you've got -- maybe then you've got a plausible argument that CSX at that point knows that these people have a health condition that makes it perhaps hazardous for them to come to work, and in that context, I could see an argument that this is a violation.

But somebody calls CSX and says, I've got the flu, I'm not working today, then I don't think CSX is on notice that

there's a hazardous work condition possible just because that person is sick and should not work that day. I think a hazardous condition arises only if CSX is telling them you need to come to work despite that.

MR. PAUL: Well, I don't think that the plaintiffs in this case knew that they were going -- by submitting the COIIs at that time. But certainly the effect of all of these people, people other than the plaintiffs being charged for submitting the certificate of ongoing illness would certainly be a deterrent to other employees submitting them in the future.

I mean, that's --

THE COURT: Okay.

MR. PAUL: And obviously the plaintiffs would have no reason to have known, you know, not to submit the COIIs. They thought they were doing the right thing, and almost immediately CSX took negative action, you know, on them.

The (c)(2) plan I think is pretty straightforward in the sense that, yes, the Fourth Circuit has not ruled on it, but other circuits have, requiring there to be a work-related -- a treatment plan for work-related. And our argument is very simple. If these were sedentary jobs, we would have no argument for the most part under the normal set of facts. But when you have cumulative, repetitive stress injuries, and CSX has had a cumulative program for years,

acknowledging that machinists and electricians and the plaintiffs themselves testified about working in small corners at repetitive angles, that it is very reasonable that a jury could conclude that part of the treatment with the chiropractors was related to the years of work. If an employee was there six months, maybe not.

THE COURT: Where is the interference with that medical treatment?

MR. PAUL: The interference is with questioning their treatment, accusing them of fraud with treating with these two chiropractors, and then saying we're not going to accept your paperwork for it.

THE COURT: From those particular --

MR. PAUL: From those two providers.

THE COURT: Well, so first I have to admit it strikes me as questionable in that CSX did not say you can't go get treatment from these two chiropractors. Or even we're going to tell the insurer that -- not to pay for treatment rendered by these guys because, you know, we think they're lying or whatever. And I'm not sure where the interference with treatment arises.

I understand CSX said we're not going to trust the chiropractors' reports when it comes to approving you for being off work. And in fact, we think you're lying about this, and this is all part of a scheme, and so we're

discharging you. Again, it seems to me that the -- I'm not sure where this could constitute a violation of this provision of the Rail Safety Act.

MR. PAUL: Well, I mean, I certainly understand Your Honor's distinction between treatment and paperwork related to the treatment, but let's use FMLA as an example. If someone was treating with a chiropractor and having great success, whatever the case may be, and then they need FMLA certification paperwork, and an employer said we're not going to accept that -- excuse me -- not going to accept that from Dr. Johnson or Dr. Carey, that is interference with a very important part of not just their medical treatment, but the justification for the absence.

THE COURT: And I think you're probably right, it might be a violation of the Family Medical Leave Act, but I don't think that means that it also constitutes a violation of this part of the Rail Safety Act.

MR. PAUL: I think only in the sense that it's interfering with the treatment plan because while, yes, on the one hand a railroader, one of the plaintiffs could continue to treat with Dr. Johnson or Dr. Carey, any paperwork necessary to justify an absence related to that treatment for a flare-up of pain would not be accepted.

THE COURT: Then the other question I've got is, as I recall -- and I admit, I have not spent a lot of time

especially recently looking over the COIIs themselves, just kind of generally got familiar when I started reviewing all this. But it seems abundantly clear that none of the COIIs claim that this -- that these conditions were work-related injuries.

MR. PAUL: Should I respond?

THE COURT: Yeah.

MR. PAUL: Yeah, okay. So, one, the certificate of ongoing illness form is a CSX form, and it is true that there is no box or anything that asks that question. It would be nice if there was. That's one thing, they designed the form.

Two, most of them are just discussing the treatment. All of them discuss some measure of treatment that the chiropractors performed. Some of them indicate, and we don't dispute this, that the straw that broke the camel's back is what we would say happened outside of work, lifting a hot tub, changing a wheel, et cetera.

Yeah, so we definitely agree that all of the plaintiffs except for one who settled --

THE COURT: Is that Woods, is that who settled?

MR. PAUL: Yeah, that's Woods, that's one of --

MS. BIRD: I didn't hear you.

THE COURT: Woods.

MR. PAUL: That with the exception of Mr. Woods, all the others, the incident that precipitated them going out of

work occurred off property, right, somewhere else. But because of the nature of their work and the cumulative build-up, that their testimony is that the treatment was related. And some even testified that one of the reasons that they treated with one of these chiropractors was because of its location to the workplace. It was on the way such that they could get treatment before or after work.

THE COURT: Well, the statute that you're quoting from, the prohibition is against interfering with treatment of an employee who is injured during the course of employment. And so if these forms don't indicate -- and I'm sorry I don't have a better recollection. I thought it was clear that the forms indicated this was all off-the-job conditions, that these were people were not claiming that they got injured on the job or even that the job exacerbated some condition.

So --

MR. PAUL: There's two points --

THE COURT: -- I have trouble believing that it would be a violation of the Rail Safety Act for the employer to -- I'm trying to think of a hypothetical, but it's probably more complicated to try to do that here.

It doesn't seem that the employer was faced with forms that indicated these are people who are claiming that they have a work-related component to their medical -- causation to their medical condition.

MR. PAUL: I think there's two parts, the testimony is there's two parts to the form. I think the employee fills out the very top part which is, like, where you work, your name and address, and then the chiropractor or other physician or health care provider completes the bottom part.

But I think that when you look at those, if you look one by one, the majority of them just say something like -- it's kind of chicken scratch -- you know, injured on the lawn mower or on the ATV. There's nothing -- things like that, but there is no --

THE COURT: When a worker is literally claiming that an injury resulted from work, is there not some other form that they have to file, whether it's I fell off the engine, or whether it's I did a lot of lifting at work today, and when I went home, I had to go to the doctor, my back was injured or sore?

MR. PAUL: Most certainly there is when that injury happens at work on property. I think the gray area for years -- and now we're getting a little bit outside of employment law. But I think for years, there was this cumulative nature, whether it's carpal tunnel or repetitive stress -- and, sure, people wouldn't, like, run to the office and fill out an injury report because there wasn't a specific acute injury. It was more an occupational illness over time.

And so I think that can get tricky, and I think that's

a gray area in injury law, and I think that's a gray --

THE COURT: I agree, it probably is a gray area, and that's another reason why I'm skeptical of having the Rail Safety Act apply to this factual scenario, even when I take this in the light most favorable to the plaintiffs.

MR. PAUL: But if it were true, like, let's say that a machinist, you know, works there 20 years, did the same type of repetitive work, received treatment for that, never to the point where it had to take him off of work, but then he goes golfing and then he is doing some yard work, and that build-up of that strain in muscle is what caused him to mark off that day, that is what we're saying the plaintiffs have evidence it happened to them.

THE COURT: Okay.

MR. PAUL: So I think that's -- I think those were all the points that I had.

THE COURT: Okay. Thank you.

MR. PAUL: Thank you.

MS. BIRD: That's the evidence that hasn't been shown because that's the evidence we haven't seen.

And you're right, there is a form called a PI-1A for CSX -- that's the name of it -- that allows you to fill out a form if your injury or illness occurs at work or is related to your work, and that was not filled out in any of these cases.

More importantly, after the COIIs were produced, which

had the chiropractor's assessment of how the injury happened in many respects -- loading a kayak, falling off a car, tailgate of a truck, overturning a lawn mower -- none of them said, none of the COIIs said that anything happened at work or related to their work at all.

More importantly, in every one of the cases that were filed with OSHA through the Department of Labor -- the Department of Labor and OSHA through the FRSA process, not one of them said it was work related, not one. And in fact, that's why they were all denied by the Department of Labor. And those complaints and those denials are evidence in this case because every one of them said it happened at home, it did not happen on the job.

This was evaluated, and this issue has been determined in two different circuits, the Third Circuit in the Port Authority Transportation Hudson Corp. versus U.S. Department of Labor case -- that's the Third Circuit case -- and in the Sixth Circuit case, the Grand Trunk Railroad Company versus U.S. Department of Labor case.

In both of those cases, this exact issue was discussed, and this is --

THE COURT: Meaning where an employee claims that they've got a condition that is aggravated?

MS. BIRD: Had a condition that did not occur at work, but in fact they were filing a Federal Rail Safety Act

complaint.

THE COURT: Okay.

MS. BIRD: And in both of those cases, it was found that only applies to work-related, on-the-job injuries in both of those cases.

There is -- there is, number one, no evidence whatsoever in this case about this cumulative trauma disorder leading up to an off-the-job injury. There is no evidence to even say that in this case. But secondly, even if this cumulative trauma had a part in this, these two cases would say those are not on-the-job, work-related injuries and, therefore, they are not covered by the FRSA.

So in both of those cases that have been decided by two different circuits -- there is not a case in the Fourth Circuit, let's not make one. In the Fourth Circuit, there is not a case on point but, in fact, that work-related injuries are not covered, and you cannot violate the Federal Railroad Safety Act by terminating someone who did not have an on-the-job injury.

THE COURT: All right. Thank you.

MS. BIRD: Thank you.

THE COURT: All right. So first I appreciate the briefing that you all have done in this case, it was quite well done, and I appreciate the arguments today.

I can tell you this much right now, and that is,

first, I'm inclined to say I'm going to end up granting summary judgment for the defendant as to the Rail Safety Act claim. I want to think about the arguments I've heard with respect to the leave act in both contexts as well as the other acts.

Also I've got I guess what I consider bad news, and that is that as you, I'm sure, are aware, we've had compressed periods where we've had jury trials, and jury trials have been interrupted. As a result, we're currently in a period where we are having jury trials. I hope that continues. I'm not completely sure that it will if West Virginia's COVID numbers continue to deteriorate the way they have in the last literally few days.

Be that as it may, as a result of the backlog of criminal cases, I cannot give you the trial date that we had selected long ago and tried to plan on in this case. I've just got too many criminal cases that are coming up. I have to schedule them under a speedy trial clock. That means that I have to schedule them for trial during a fixed period. And that unless we get back to where we are precluding all trials, which wouldn't help you either, I'm going to have trials, criminal trials scheduled throughout the period the three weeks or so that we had hoped to try this case.

So as a result, I don't -- this is the kind of case that I think there is too much to it to expect you all to kind

of be ready at the drop of a hat, and so I'd rather not expect that of you. Given that I have to schedule trials through this period, I'm going to continue this case.

What I'd like to suggest is this. I hope to make my decision on the remaining motions within the next week. Once I've done that, that will -- honestly, it seems to me, that unless I grant summary judgment in favor of the defendant and there is no trial necessary, if trial is going to proceed on one or more of these claims, it's probably going to be the same evidence and the same length of trial and so forth that we currently expect. So what I would be inclined to do is make my decisions, and once I do, if there are claims that survive, I would then expect to have some type of teleconference with you as quickly as possible to talk about scheduling and to get this back on the calendar. And honestly that's about the best I can tell you right now.

So I'm happy to hear any questions or reactions you might have to that.

MR. PAUL: The only immediate question is, does that impact our pretrial order that was due today?

THE COURT: Yes. I can't see a need for you to go through the steps of the pretrial and the other things, the other disclosures that are required unless and until we have a better fix of the trial date --

MR. PAUL: Thank you, Your Honor.

THE COURT: -- because I know there's a lot of work to that.

And then honestly I want to decide these motions also before I expect you to go through that process because it will be dramatically affected by my rulings if I don't grant full summary judgment.

MS. BIRD: Thank you, Your Honor. That was it. I was going to ask the same question.

THE COURT: Okay. All right.

Yes?

MR. PAUL: I mentioned this earlier. Could we put the settlements on the record for those plaintiffs?

THE COURT: Sure.

MR. PAUL: They are Tony Abdon, Mike Campbell --

THE COURT: Go slow here so we can -- go ahead.

MR. PAUL: Should I start again?

THE COURT: Yes.

MR. PAUL: The first one is Tony Abdon, A-B-D-O-N. Mike Campbell. Chad Little, the Estate of Chad Little. Matthew Woods. John Frasure, F-R-A-S-U-R-E. And Kevin Palmer.

THE COURT: All right.

MS. BIRD: That's correct, Your Honor. That brings me to one additional point, though, that I want to just bring to the Court's attention.

In this case, there are individually named defendants, as you know. There is CSX Transportation, there is Dr. Heligman, the medical provider, and then there are eight other defendants. With the settlement of those cases, that removes six of the defendants. Am I right about -- six, removes six of the defendants from having anything to do with this case.

We've approached the plaintiffs and asked that those people be voluntarily dismissed, those six that have nothing to do with the other cases. We'd also ask that the two -- you know, the other individually named defendants are dismissed, but we're not there yet, but that is out there. And we're hoping that we can get those dismissals for those six individually named defendants that only have to do with those settled plaintiffs.

THE COURT: Well, I take it the way you're addressing this, there wasn't an explicit part of the settlement that contemplated dismissal of claims against those defendants.

MS. BIRD: We did not because the settlements were done one by one.

THE COURT: Well, all right. So I expect you all to address that with each other and then see where that leads.

Typically when we get a settlement, we do an order giving the parties like 30 days to finalize everything and submit an agreed order. I'm not inclined to do that here. With the case active, I'm sure you all will take care of that.

But how long do you expect it will be before you execute settlement agreements and prepare orders as to those particular plaintiffs --

MS. BIRD: Very likely --

THE COURT: -- and/or the defendants?

MS. BIRD: Easily within 30 days, Your Honor. We just came to an agreement on the terms sheets today. I don't think there's any hold-up or liens or anything else but for one person. Could be, but I don't even know that that's right, it's a possibility. So I anticipate within 30 days it will be resolved.

THE COURT: All right. Well, we're not going to enter any special orders or separate orders with respect to those, then.

All right. Is there anything else we need to take up on the record?

MR. PAUL: No. Thank you.

THE COURT: All right. We're going to go off the record.

(Off the record at 2:59 p.m.)

THE COURT: All right. Thank you all for your appearance today. We stand adjourned.

(Proceedings were concluded at 3:01 p.m.)

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CERTIFICATION:

I, Kathy L. Swinhart, CSR, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter as reported on August 5, 2021.

September 10, 2021
DATE

/s/ Kathy L. Swinhart
KATHY L. SWINHART, CSR